



For a thriving New England

CLF Vermont

15 East State Street, Suite 4
Montpelier, VT 05602
P: 802.223.5992
F: 802.223.0060
www.clf.org

October 2, 2013

James S. Oleksak, Jr., President and Director
T.J. Bark Mulch, Inc.
997 Western Avenue
Westfield, MA 01085

James S. Oleksak, Jr., President and Director
T.J. Bark Mulch, Inc.
25 Sam West Road
PO BOX 1168
Southwick, MA 01077

Tyler Oleksak, Vice President
T.J. Bark Mulch, Inc.
1400 Genreal Knox Road
Russell, MA 01071

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation (“CLF”)¹ hereby gives notice to the addressed persons of its intent to file suit pursuant to Section 505 of the Federal Water Pollution Control Act (hereinafter “Clean Water Act,” “CWA,” or “Act”), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R., part 135 (the “Notice”) to the addressed persons of CLF’s intention to file suit in United States District Court of the District of Massachusetts seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter.

The subject of this action is two-fold. First, T.J. Bark Mulch, Inc., (hereinafter referred to as “T.J. Bark”) is discharging stormwater directly associated with the timber products facility at 25 Sam West Road, P.O. Box 1168, Southwick, MA 01077 (the “Facility”), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, T.J. Bark has failed to obtain coverage under any Clean Water Act permit including the Multi-Sector General Permit² (“MSGP”) adopted by EPA for industrial sources of polluted stormwater runoff, and failed to comply with the specific

¹ CLF is a not-for-profit 501(c)(3) organization dedicated to the conservation and protection of New England’s environment.

² ENVIRONMENTAL PROTECTION AGENCY, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP) [hereinafter MSGP or “permit”], *available at* http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf (last visited February 13, 2012).

requirements of any such permit, in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

BACKGROUND

The Facility is located along the bank of Slab Brook, which flows into Great Brook (Waterbody ID MA32-25) downstream of the Facility. Great Brook is categorized as a Category 2 Waterbody, indicating that it is in attainment for some uses and has not been assessed for other uses.³ Great Brook conflues with the Westfield River downstream of the Facility.

The Westfield River (Waterbody Segment MA32-06) is categorized as a Category 3 Waterbody, indicating that it has not been assessed.⁴

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.⁵ Industrial activities, such as material handling and storage, processing, reclaiming, and wholesale distribution of timber product materials or other operations that occur at industrial facilities, may be exposed to stormwater.⁶ Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.⁷

T.J. Bark is required to apply for coverage under a Clean Water Act discharge permit such as the MSGP in order to discharge lawfully. Since at least 2007, T.J. Bark has been specifically required to apply for coverage under the MSGP by filing a Notice of Intent (“NOI”) within ninety days after the initial issuance of the MSGP.⁸ On September 29, 2008, after expiration of the prior permit, the EPA issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2008 permit by January 5, 2009.⁹

T.J. Bark has failed to obtain coverage under the MSGP or any other valid authorization, at any time. Therefore, T.J. Bark is operating in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

T.J. Bark Mulch, Inc., is the person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. T.J. Bark has operated the Facility since at least 2007, currently advertises as the

³ Massachusetts Year 2012 Integrated List of Waters, *available at* <http://www.mass.gov/eea/docs/dep/water/resources/07v5/12list2.pdf> (last visited September 25, 2013).

⁴ Massachusetts Year 2012 Integrated List of Waters, *available at* <http://www.mass.gov/eea/docs/dep/water/resources/07v5/12list2.pdf> (last visited September 25, 2013).

⁵ See 40 C.F.R. § 122.26(b)(13).

⁶ See 40 C.F.R. § 122.26(b)(14).

⁷ See 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

⁸ EPA’s Final National Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) was first issued in 1995, reissued in 2000, and again in 2008. See 60 Fed. Reg. 50,804 (Sept. 29, 1995); 65 Fed. Reg. 64,746 (Oct. 30, 2000); and 73 Fed. Reg. 56,572 (Sept. 29, 2008). See MSGP part 1.1 and 1.3.1.

⁹ See MSGP Table 1-2.

operator of the Facility, and is registered with the Secretary of the Commonwealth as the operator of the Facility.¹⁰ T.J. Bark and its agents and directors, including but not limited to James S. Oleksak, Jr., have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the Clean Water Act.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 25 Sam West Road, P.O. Box 1168, Southwick, MA 01077.

ACTIVITIES ALLEGED TO BE VIOLATIONS

T.J. Bark has, and continues to, engage in “industrial activities,” and its operations fall under SIC Code prefix 24, within the meaning of 40 C.F.R. § 122.26(b)(14)(ii).¹¹ Because the Facility has a primary SIC Code of 2499 and stormwater discharges associated with industrial activity, T.J. Bark is required to apply for, obtain coverage, and comply with the requirements of a National Pollutant Discharge Elimination System (“NPDES”) permit such as the MSGP. T.J. Bark has failed to take any of these required steps.

T.J. Bark’s activities at the Facility include, but are not limited to: buying producing, processing, collecting, storing and selling logs, mulch, bark, wood chips, firewood, top soil, clean mill chips, leaf compost and all types of earth products including stone products and mason sand; the purchase, collection, processing and storage of bark, wood chips and mulch outdoors and the operation and storage of industrial equipment. The Facility’s piles contain, but are not limited to: large amounts of wood, logs, mulch, sawdust and earth products.

Piles of wood, mulch, sawdust and sawmill products, interior access roads, vehicles and heavy equipment, and material processing and handling areas at the Facility are exposed to precipitation and snowmelt. Precipitation falls on and flows over the industrial materials and areas, picking up bark and wood debris, total suspended solids (TSS), leachates (which can contain high levels of TSS and biochemical oxygen demand (BOD)), oil, grease, metals, solvents, acids, nutrients, pathogens, dissolved solids, trash, fuel and other pollutants associated with the Facility’s operations. The polluted runoff is then conveyed by the operation of gravity via site grading, sloped surfaces, surface water channels, and subsurface hydrological connections into waters of the United States.¹²

¹⁰ http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=043163926&SEARCH_TYPE=1 (last visited October 1, 2013). According to the Secretary of the Commonwealth, T.J. Bark Mulch, Inc. lacks a registered agent.

¹¹ See MSGP, Appendix D: Activities Covered, at D-2. Timber products facilities identified by the SIC Code prefix 24 (including but not limited to 2499-13: wood, mulch and sawdust and 2411: log storage and handling) are subject to the requirements of the MSGP for stormwater discharges. T.J. Bark’s industrial activity may also include activity under other SIC Codes related to the processing and sale of a variety of stone products.

¹² See 40 C.F.R. § 122.26(c)(1)(E)(6). EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The Clean Water Act prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹³ T.J. Bark discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), from its Facility via by the operation of gravity via site grading, sloped surfaces, surface water channels, and subsurface hydrological connections into waters of the United States. Because T.J. Bark has not obtained coverage for these stormwater discharges under the MSGP or an individual NPDES permit, it is illegally discharging stormwater without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).¹⁴ By failing to apply for and comply with the specific requirements of the MSGP, T.J. Bark, is in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

a. T.J. Bark is discharging stormwater to waters of the United States without a permit.

T.J. Bark is an industrial discharger with a primary SIC Code of 2499 which means that pursuant to Section 402(p) of the Act, T.J. Bark is obligated to apply for coverage under the MSGP or obtain other legal authorization. Because T.J. Bark has operated and continues to operate without a permit under Section 402(b), T.J. Bark is in violation of Section 301(a) of the Act.

In addition, during storm events, T.J. Bark's "industrial activities" at its Facility have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14), from its Facility on each and every day that there has been a measurable precipitation event of above 0.1 inches. There have been many such storm events since 2007. The Facility is generating and conveying pollutants from at least the following point sources: log decks, piles of wood, mulch, sawdust and earth products, interior access roads, collected runoff from material processing and handling areas, channelized flow of runoff, the equipment left outdoors, the vehicles driving on and off the Facility, and other collections and conveyances of stormwater associated with industrial activity.¹⁵ Slab Brook flows into Great Brook which flows into the Westfield River, all of which are "waters of the United States," as defined in 40 C.F.R. § 122.2, and therefore, "navigable waters," as defined in 33 U.S.C. § 1362(7). The Facility is discharging this industrial stormwater without the permit required under Section 402 of the Act, 33 U.S.C. § 1342.

b. T.J. Bark is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.

T.J. Bark is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for, obtain coverage, and comply with the requirements of the MSGP.¹⁶ The

¹³ 33 U.S.C. § 1311(a).

¹⁴ See 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; MSGP, Appendix A: Definitions, Abbreviations, and Acronyms (defining the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source").

¹⁵ These discharges constitute "point sources" as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2.

¹⁶ MSGP part 1.1 and 1.2.

Facility must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.¹⁷ T.J. Bark's failure to obtain coverage and comply with the permit is in violation of the MSGP and 33 U.S.C. § 1342(p) of the Clean Water Act.¹⁸

1) T.J. Bark, Must Develop and Implement a Stormwater Pollution Prevention Plan (SWPPP).

As a prerequisite to obtaining coverage under the MSGP, T.J. Bark must prepare a Stormwater Pollution Prevention Plan ("SWPPP").¹⁹ The SWPPP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.²⁰ T.J. Bark has failed to develop a SWPPP in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

2) T.J. Bark Must Submit to EPA a Complete Notice of Intent to be Covered under the MSGP.

To be eligible to discharge under the MSGP, T.J. Bark must submit a complete Notice of Intent ("NOI") to the EPA.²¹ Additionally, as part of preparing the NOI, the covered Facility must make certain verifications such as verifying that no harm is done to a species in violation of the Endangered Species Act.²² T.J. Bark has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

3) T.J. Bark Must Implement Control Measures and Meet Water-Quality Effluent Limitations.

To be eligible to discharge under the MSGP, T.J. Bark must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies. T.J. Bark must address the selection and design considerations in the permit, meet the non-numeric effluent limitations in the permit, and meet limits contained in applicable permit effluent limitations guidelines.²³ These control practices must be in accordance with good engineering practices and manufacturer's specifications.²⁴ If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as

¹⁷ See MSGP part 1.1; MSGP part 8.N.

¹⁸ A thorough search of EPA's Electronic Stormwater Notice of Intent database reveals that T.J. Bark has not filed an NOI for the Facility. EPA's Electronic Stormwater Notice of Intent database, <http://cfpub.epa.gov/npdes/stormwater/noi/noisearch.cfm> (last visited September 26, 2013).

¹⁹ See MSGP part 5.

²⁰ See MSGP part 5.1.

²¹ See MSGP part 1.3.1.

²² See MSGP part 1.1.4.5 and 2.3.

²³ See MSGP part 2.1.

²⁴ *Id.*

practicable.²⁵ T.J. Bark has failed to cover the materials and operations that may result in polluted stormwater runoff. T.J. Bark has not implemented the required control measures in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

4) T.J. Bark Must Conduct Routine Facility Inspections.

To be eligible to discharge under the MSGP, T.J. Bark must conduct routine inspections of all areas of the Facility where industrial materials or activities are exposed to precipitation, and must ensure that all stormwater control measures comply with the effluent limits contained in the MSGP.²⁶ Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.²⁷ These inspections must occur when the Facility is in operation.²⁸ The schedule of these inspections must be included in the Facility's SWPPP and be performed by qualified personnel.²⁹ T.J. Bark has failed to conduct the required routine inspections in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

5) T.J. Bark Must Comply with the Required Monitoring and Sampling Procedures.

To be eligible to discharge under the MSGP, T.J. Bark must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.³⁰ The MSGP requires five types of analytical monitoring (one or more of which may apply) including quarterly benchmark monitoring, annual effluent limitations guidelines monitoring, State or Tribal-specific monitoring, impaired waters monitoring, and other monitoring as required by the EPA.³¹ An operator must monitor each outfall identified in the SWPPP covered by a numeric effluent limit.³² Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.³³ All monitoring data collected under the MSGP must be reported to EPA. T.J. Bark has failed to conduct the required monitoring under the MSGP and has failed to submit the required monitoring reports to EPA in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

6) T.J. Bark Must Carry out the Required Reporting and Recordkeeping.

T.J. Bark must maintain and submit any and all required monitoring data.³⁴ Such monitoring data includes the following: an annual report to EPA which includes the Facility's findings from the annual

²⁵ *Id.*

²⁶ *See* MSGP part 4.1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See* MSGP part 6.

³¹ *See* MSGP part 6.2.

³² *See* MSGP part 6.1.1.

³³ *See* MSGP part 6.1.3.

³⁴ *See* MSGP part 7.1

comprehensive site inspection and any documentation of correction actions;³⁵ an Exceedance Report to the EPA if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;³⁶ and any other required reports under the MSGP.³⁷ T.J. Bark has failed to maintain the required records and failed to submit all required monitoring data under the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

7) T.J. Bark Must Comply with the Requirement of MSGP Subpart A.

T.J. Bark must also comply with the sector-specific requirements contained in Subpart A of the MSGP.³⁸ Subpart A requires timber products facilities to implement additional technology-based effluent limits,³⁹ meet additional SWPPP and inspection requirements,⁴⁰ and monitor stormwater discharges for compliance with the benchmark limitations applicable specifically to timber products facilities.⁴¹ T.J. Bark must also prevent any discharge of any chemical formulations or chemical additives sprayed on or applied to wood products⁴² and abide by the effluent limitations for spray down/ intentional wetting of logs, if any.⁴³ T.J. Bark has failed to comply with the requirements of Subpart A of the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

DATES OF VIOLATION

Each day on which T.J. Bark operates its Facility without permit coverage or discharges stormwater without a permit from the Facility is a separate and distinct violation of Section 301(a) and 402(p)(2)(B) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

T.J. Bark has discharged stormwater without a permit in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), on every day since at least 2007 on which there has been a measurable precipitation event.

Every day, since at least 2007, on which T.J. Bark has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the Clean Water Act, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

³⁵ See MSGP part 7.2.

³⁶ See MSGP part 7.3.

³⁷ See MSGP part 7.4.

³⁸ See MSGP, Appendix D, Table D-1, Sector A. In addition, to the extent that T.J. Bark's industrial activity falls under another industrial sector listed in MSGP, Appendix D, Table D-1, T.J. Bark must also comply with the sector-specific requirements for that sector.

³⁹ See MSGP part 8.A.3.

⁴⁰ See MSGP part 8.A.4 and 8.A.5.

⁴¹ See MSGP part 8.A.6.

⁴² See MSGP part 8.A.2.

⁴³ See MSGP part 8.A.7.

These violations are ongoing and continuous, and barring a change in the stormwater management controls at the Facility and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

T.J. Bark is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects T.J. Bark to a penalty up to \$32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, and up to \$37,500 per day for each violation that occurred after January 12, 2009.⁴⁴ CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring T.J. Bark, to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with matter.

CONCLUSION

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Zachary Griefen within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,



Zachary K. Griefen, Esq.
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x4011
zgriefen@clf.org

⁴⁴ 40 C.F.R. § 19.2



cc:

Lisa Jackson
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

H. Curtis Spalding
Environmental Protection Agency
EPA Region 1 Administrator
5 Post Office Square - Suite 100
Boston, MA 02109-3912

Kenneth L. Kimmell, Commissioner
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108